No. .....

In the

Supreme Court of the United States

OCTOBER TERM, 1965

ALAMO EXPRESS INC., BROWN EXPRESS, INC., RED ARROW FREIGHT LINES, INC., AND SOUTHWESTERN MOTOR TRANSPORT, INC.,

Appellants,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION AND CENTRAL FREIGHT LINES INC., W. W. CALLAN AND INLAND MOTOR FREIGHT LINES, INC.,

Appellees.

On Appeal from the United States District Court for the Western District of Texas, San Antonio Division

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, CENTRAL FREIGHT LINES INC. and W. W. CALLAN move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge District Court affirming the orders of the Interstate Commerce Commission and dissolving a temporary injunction in an action by Appellants to set aside orders of the Interstate Commerce Commission (239 Fed. Sup. 694).

These orders originated pursuant to an application by CENTRAL FREIGHT LINES INC. and W. W. CALLAN for approval of acquisition by CENTRAL FREIGHT LINES INC. of control of INLAND MOTOR FREIGHT LINES INC. through purchase of capital stock, and, in turn, by W. W. CALLAN, by virtue of the transaction.

After having considered the record on three separate occasions in three reports and orders, Division 3 of the Commission, acting as an appellate division, ultimately concluded by order of June 29, 1964, that acquisition by Central Freight Lines Inc. of control of Inland Motor Freight Lines Inc., through purchase of capital stock, constitutes a transaction within the scope of Section 5(2)(a) of the Interstate Commerce Act and will be consistent with the public interest and should be approved and authorized subject to a condition.

The Appellants contended, with success until the orders in question were granted, that a prior separation of intrastate from interstate rights by Inland to Appellant, Alamo Express, Inc. and Appellant, Southwestern Motor Transport, Inc., should result in denial of Central's and Callan's application to control Inland because such separation of rights contra-

vened an established policy of the Commission, declining to approve transactions where the severance of interstate and corresponding intrastate rights, previously operated by a single carrier, resulted in the creation of two rights and two operations in the place of one. However, the Commission ultimately accepted a second petition for reconsideration filed by Central and Callan, pointing out an *overlooked* exception to the "split-off" policy of the Commission, the exception being expressed in *Shein's Express—Purchase—Leo Smith Forwarding Co., Inc.*, 80 M.C.C. 511, wherein the parties before the Commission were "non-offending" parties and unconnected with the split-off.

The proceeding was instituted in the United States District Court for the Western District of Texas, San Antonio Division, seeking to set aside, enjoin and annul the orders of the Interstate Commerce Commission entered on June 29, 1964 approving the transaction and the order of October 29, 1964 denying the Petition for Reconsideration. The basic contentions of the Appellants can be summarized as follows:

(1) Whether the Commission exceeded its statutory jurisdiction, abused its discretion and acted unlawfully in accepting Central's second petition for reconsideration and extraordinary relief, and in reopening the "control case" proceeding for reconsideration of the record in light of a controlling but overlooked prior Commission decision setting forth an exception to the Commission's general policy in a Section 5 transaction where there has been a split-off of intrastate and interstate operating rights.

(2) Whether the Commission's ultimate conclusion, upon reconsideration, in reversing prior denials of authority and approving and authorizing the transaction under Section 5(2)(a) as consistent with the public interest, is rational, based upon adequate findings and supported by substantial evidence.

SCOPE OF REVIEW

The opinion of the United States District Court quite adequately defines the function of courts in reviewing Interstate Commerce Commission orders. This is perhaps best summarized in a quotation from *McLean Trucking Co., Inc. v. United States*, 321 U.S. 67, at 87 (1944):

> "* * * if the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order."

This principle is supported by other authorities cited by the District Court.

CONTINUING JURISDICTION OF INTERSTATE COMMERCE COMMISSION

Appellants attack the acceptance by the Commission of the second petition for reconsideration filed prior to the effective date of the Commission's then existing orders which set forth for the first time an overlooked but well-recognized exception to the Commission's "split-off" policy.

The Commission has consistently held that any of its decisions or orders may be reopened or reconsidered at any time, *American Packing & Provision Co. v. Union Pacific*

R.R. Co., 216 I.C.C. 613, 614-616; and *Abco Moving & Storage Co., Inc.—Purchase—Wm. Dierking*, 47 M.C.C. 557, 567, and cases cited.

The Interstate Commerce Act, particularly Sections 17(6), 17(7) and 17(8) and 221(b), clearly give the Commission continuing jurisdiction over its orders and empowers it to reconsider and rescind, change or modify them at any time. This is the holding of *Baldwin v. Scott County Milling Co.*, 307 U.S. 478 and *Sprague v. Woll*, 122 Fed. 2d 128 (CCA-7th), certiorari denied 314 U.S. 669, wherein the Court quotes old Section 16(a) of the Act (now revised and incorporated in Section 17(6), (7) and (8) of the present Act). See also *Riss & Company v. United States*, 100 Fed. Sup. 468, 474.

APPROVAL OF CONTROL

The Commission's prior report of January 11, 1963 makes it clear that the main basis for denial of control was its general policy against approving split-offs. However, this decision was reversed when an overlooked exception to the split-off doctrine was called to the Commission's attention in the second petition for reconsideration. This was the exception expressed in *Shein's Express—Purchase—Leo Smith Forwarding Co., Inc.*, 80 M.C.C. 511. The Commission found that the parties to this application were not responsible for the original split-off and that Inland no longer owned or controlled the reversionary interest in the leased intrastate certificates.

Approval by the Commission here neither caused, created, permitted, perpetuated nor sanctioned the severance of Inland's intrastate or interstate rights; and a denial would not have permitted, eliminated, discontinued or cured the split-off.

Strangely enough, Appellants, Alamo Express, Inc. and Southwestern Motor Transport, Inc., who were offending parties in the original split-off, were before the Commission as protestants and are plaintiffs and appellants in this cause.

The split-off doctrine was the result of the "second proviso" and the provisions for registrations of intrastate certificates contained in 49 USCA 306(a)(6)(7), which was *repealed* effective October 15, 1962. The repeal effectively precludes any further split-off.

This former Act of Congress permitted split-offs by authorizing, without restriction, the registration of intrastate certificates of public convenience and necessity and conducting interstate operations thereunder by carriers operating wholly within a state. The "split-off doctrine" was an Interstate Commerce Commission policy and not the result of an Act of Congress. The Commission had previously recognized an exception to this policy in the Shein case, 80 M.C.C. 517, finding therein that the immediate applicants were not parties to the split-off and were not offending parties.

Likewise, the Commission in the instant case found that the applicants were not responsible for the split-off and were

not offending parties and that this exception to the policy was applicable.

CONCLUSION

The appeal presents no substantial issue warranting plenary consideration and the judgment of the Court below should be affirmed.

Respectfully submitted,

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By W. E. Cureton
Of Counsel

Attorneys for Appellees,
Central Freight Lines Inc. and
W. W. Callan.

PROOF OF SERVICE

I, W. E. CURETON, attorney for CENTRAL FREIGHT LINES INC. and W. W. CALLAN, Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 30, 1965, I served copies of the foregoing Motion to Affirm on the Appellants by depositing the same in the United States Mail, with first-class postage prepaid, addressed to counsel of record for Appellants to each of them at the following post office addresses:

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Central Freight Lines Inc. and
W. W. Callan.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 357

ALAMO EXPRESS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action brought by appellants to set aside orders of the Interstate Commerce Commission. The Commission's orders approved, under Section 5(2)(a) of the Interstate Commerce Act, 49 U.S.C. 5(2)(a), the ac-

quisition by Central Freight Lines, Inc. ("Central") of control of Inland Motor Freight Lines, Inc. ("Inland"), through purchase of capital stock. The principal issue in the Commission proceedings was whether the acquisition of control should be disapproved because Inland previously had transferred its state-granted intrastate operating rights to appellants Alamo Express, Inc. and Southwestern Motor Transport. Under Section 206 of the Commerce Act (49 U.S.C. 306) as it read before 1962, the holder of an intrastate certificate could use it for transporting goods moving in interstate commerce and could transfer such certificate while retaining a corresponding interstate certificate, as Inland did, thus creating two operating authorities in place of one.[1] To discourage this, the Commission followed the policy of declining to approve under Section 5 any transfers involving the severance of interstate and corresponding intrastate operating rights[2] except when the parties before it were not responsible for the split-off and creation of duplicate rights[3] and the transaction was otherwise consistent with the public interest.

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[1] Split-offs were expressly barred by the 1962 amendment to Section 206(a), 49 U.S.C. 306(a), 76 Stat. 911, *infra*, pp. 7-8.

[2] See, *e.g.*, *Associated Transport, Inc.—Purchase—Russell*, 55 M.C.C. 177, 183 and cases cited; *Southern Pacific Transport Co.—Purchase (Portion)—Inland Motor Freight Lines, Inc. (Frank Brackney, Receiver)*, 65 M.C.C. 775, 779; *Navajo Freight Lines, Inc.* v. *United States*, 186 F. Supp. 377, 381-383 (D. Colo., 1960).

[3] *Shein's Express—Purchase—Leo Smith Forwarding Co., Inc.*, 80 M.C.C. 511, 517.

The pertinent facts in the instant case may be summarized as follows. In 1960 the Commission instituted a proceeding to determine whether Central had, without prior Commission approval, acquired unlawful control of Inland. Central then applied for authority to acquire control of Inland through stock ownership, and obtained temporary authority to control under Section 210a(b) of the Act. On January 11, 1963, the Commission issued a single report disposing of both the investigation and the control proceedings (J.S. A-12), in which it found that Central had indeed acquired unlawful power to control Inland through its relationship with Inland's present owner, and denied Central's application to control Inland on the ground that there had been a prior split-off of Inland's intrastate operating rights (J.S. A-37). The split-off had been accomplished by Inland's prior owner Robinson (now deceased), who had leased its intrastate rights to appellants Alamo and Southwestern on a long-term basis. Subsequently, Robinson sold the capital stock of Inland to McNamara who in 1957 sold it to Gillan, from whom Central sought to acquire it (J.S. A-17). The reversionary interest in the leased intrastate rights now belongs to Robinson's estate.

In its initial opinion, the Commission directed Central, its principals, and Gillen, Inland's owner, to divest themselves of all direct or indirect interest in the capital stock of Inland (J.S. A-38-39). Upon reconsideration, the Commission affirmed the denial of control but modified its order to permit use of any law-

ful means to eliminate the violation without the necessity of complete divestiture (J.S. A-42).[4]

Thereafter Central and its principals, prior to the effective date of the Commission's order, filed a petition for extraordinary relief and for waiver of the agency's rule setting time limits for petitions for reconsideration (ICC Rule 1.101(e)). This petition was granted and the Commission again reopened the proceedings because, in reaching its prior decisions, no consideration had been given to whether the parties before it were implicated in the split-off, a factor pertinent under the Commission's *Shein's Express* decision, *supra*, fn. 3 (J.S. A-50). Finding that the appellants were not responsible for the split-off and that the transaction was otherwise consistent with the public interest, the Commission reversed its prior denials and granted Central authority to control Inland through the purchase of capital stock (J.S. A-51).

On appeal, the district court concluded (J.S. A-7) that the Commission had authority to reconsider and modify its prior orders and did not abuse its discretion in so doing here, and that the Commission's approval of the transaction as consistent with the public interest was supported by substantial evidence and within the Commission's lawful discretion.

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[4] The modification was necessary in order to conform to this Court's decision in *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115.

ARGUMENT

The decision below is correct, and the case presents no question substantial enough to warrant plenary consideration by this Court.

1. In a determination whether an acquisition subject to Section 5(2) should be approved as consistent with the public interest, "[t]he statute entrusts the Commission with the duty to decide what considerations * * * shall be given weight." *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 127. Thus, it is for the Commission to determine whether approval should be granted notwithstanding a prior unlawful acquisition. See *id.* at 128-129. The Commission found that the prior unlawful acquisition here was not so flagrant as to demonstrate that Central was unfit to acquire control of Inland (J.S. A-32, 36). It also found that Inland's operating rights had not been dormant (*i.e.*, inactive) during 1957-1961 [5] and that, since the present owners of Inland and the applicants were not responsible for the split-off of Inland's operating rights, the split-off was not a bar to approval but came within the exception to the strict policy against split-offs announced in *Shein's Express—Purchase—Leo Smith Forwarding*

[5] Appellants claim (J.S. 18-20) that total dormancy existed as a matter of law. But simply because Central had the power to control Inland did not, as appellants argue, make the operations conducted by Inland unlawful or dormant (J.S. A-10, 36). The operations conducted by Inland were found to be in fact commensurate with its resources and facilities and not influenced by Central to any great extent (J.S. A-36).

Co., Inc., 80 M.C.C. 511, 517. The court below upheld these findings, concluding that the approval of Central's acquisition of control of Inland was supported by substantial evidence on the record considered as a whole and was in accordance with law (J.S. A-6, 8-10); the court specifically found that the Commission's application of the *Shein's* exception to the facts of the case represented a reasonable policy determination within the area committed by the statute to the Commission's discretion (J.S. A-9). There is no basis for this Court to depart in the present case from its general rule that the reviewing court's determination of whether the agency's findings are supported by substantial evidence is final, *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491, or to disturb the Commission's appraisal of the public interest, convenience, and necessity—a matter peculiarly for expert administrative judgment. See *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115; *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173.

2. Appellants complain (J.S. 9-13) that the Commission's order upon its first reconsideration, which affirmed the denial of the control application, was a "final order", and that granting the subsequent petition for extraordinary relief violated Rule 1.101(f) of the Commission's General Rules of Practice against entertaining "successive" petitions "upon substantially the same ground". But appellees' petition for extraordinary relief was not "successive" within the cited rule, since it presented a new ground which

was controlling and had been previously overlooked by the Commission. The Commission acted before its order denying the control application became effective and so before appellants could be prejudiced as a result of justified reliance on the order. And, as the court below noted (J.S. A-7), the Interstate Commerce Act explicitly gives the Commission continuing jurisdiction over its orders with authority to modify or rescind them at any time (Sections 17(6), 221(b), 49 U.S.C. 17(6), 321(b)), which the Commission properly and sensibly exercised here to correct an error of law stemming from its having overlooked the important *Shein's* precedent. As the district court stated (J.S. A-8), citing *Federal Trade Commission* v. *Weingarten, Inc.*, 336 F. 2d 687, 695-697 (C.A. 5), "self-correction of its own errors through the use of judicial inventiveness and imaginative resourcefulness should be the aim of a well run administrative agency."

3. The principal issue presented by this case is not of continuing concern. Amendments to Section 206, adopted in 1962 (76 Stat. 911), terminated the automatic right of holders of intrastate certificates to use them for transportation in interstate commerce. Since 1962, such interstate operations must be found by the State to be required in the public convenience and necessity, and must be evidenced by ICC certificates of registration which "may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign